



September 12, 2002

Ms. Angela M. DeLuca
Assistant City Attorney
City of College Station
P.O. Box 9960
College Station, Texas 77842

OR2002-5106

Dear Ms. DeLuca:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168552.

The College Station Police Department (the “department”) received a request for copies of e-mails sent or received from all department mobile computer-equipped patrol units for a specified period of time. You state that you have withheld some responsive information from disclosure pursuant to a previous determination that our office granted all governmental bodies in Open Records Decision No. 670 (2001). You claim, however, that the remaining requested information is excepted from disclosure pursuant to sections 552.101, 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we must address the procedural requirements of section 552.301 of the Government Code. Section 552.301 provides in pertinent part that a governmental body that requests an attorney general decision must, within a reasonable time but not later than the fifteenth business day after the date of receiving the written request for information, submit to the attorney general: (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld; (2) a copy of the written request for information; (3) a signed statement as to the date on which the written request for information was received by the governmental body or evidence sufficient to establish that date; and (4) a copy of the specific information requested or representative samples of the information, if a voluminous amount of information was requested, labeled to indicate which exceptions apply to which parts of the information. *See* Gov’t Code § 552.301(e). However, we note that we have no evidence that is sufficient to establish that the department provided

the information required under section 552.301(e) to our office within fifteen days of receiving the request for information. Accordingly, we conclude that the department failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting a decision from our office regarding the remaining requested information.

When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). In such an instance, the governmental body must demonstrate a compelling interest in order to overcome the presumption and withhold the information at issue from disclosure. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the information confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). We note that section 552.103 of the Government Code as a discretionary exception to disclosure under the Public Information Act (the "Act") does not constitute a compelling interest that is sufficient to overcome the presumption that the remaining requested information is public.¹ However, since the department also claims that the remaining requested information is excepted from disclosure under section 552.101 of the Government Code, we will address that claim with respect to the submitted information. In addition, since the department claims that the Brazos County Attorney's Office (the "county attorney") has a prosecutorial interest in the release of the submitted information under section 552.108 of the Government Code, we will also address that claim with respect to the submitted information. *See* Open Records Decision No. 586 (1991) (stating that need of governmental body, other than one that received written request, may constitute compelling reason to overcome presumption that information is public).

Section 552.108(a) provides in pertinent part that "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). Section 552.108(b) provides in pertinent part that "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted . . . if: (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1). A governmental body

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

that raises section 552.108 must reasonably explain, if the requested information does not supply an explanation on its face, how and why section 552.108 is applicable to the information. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You state, and provide supporting documentation showing, that the county attorney seeks to have the remaining requested information withheld from disclosure under section 552.108 because it relates to a pending case that is being prosecuted by the county attorney and because the release of the information would interfere with the prosecution of that case. You also state that all of the submitted information is directly related to the pending prosecution because anything that the arresting officer in this matter did that evening as a department officer will be under scrutiny in trial, especially since he is the State's main witness.

We disagree. The submitted information reflects that the arresting officer sent or received only a small number of e-mail messages. Most of these messages do not relate to the arrest in this matter. Thus, neither the department nor the prosecutor has sufficiently demonstrated how or why the release of most of the remaining requested information would interfere with the detection, investigation, or prosecution of crime. *See* Gov't Code § 552.108(a)(1); *see also Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 434 at 3 (unless records show on their face that disclosure would interfere with law enforcement or prosecution, law enforcement agency must explain how release of particular records or parts thereof will do so). Consequently, we conclude that the department may not withhold most of the submitted information from disclosure under section 552.108. However, one particular email transmission sufficiently relates to the pending prosecution in this matter. Therefore, we agree that the release of this particular information would interfere with law enforcement or crime prevention. Accordingly, we conclude that the department may withhold from disclosure the information that we have marked pursuant to section 552.108 (b)(1) of the Government Code.

You also claim that the remaining submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with article 39.14 of the Code of Criminal Procedure.² We note that article 39.14 governs the discovery of information and the testimony of witnesses in criminal proceedings. Article 39.14 does not expressly make information confidential. Consequently, we conclude that the department may not withhold from disclosure any portion of the remaining submitted information pursuant to section 552.101 of the Government Code in conjunction with article 39.14 of the Code of Criminal Procedure.

² Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other statutes.

Finally, you claim that the remaining submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with the Texas Rules of Evidence. We note, however, that we generally do not address discovery and evidentiary rules that may or may not be applicable to information submitted to our office by a governmental body. *See* Open Records Decision No. 416 (1984) (finding that even if evidentiary rule specified that certain information may not be publicly released during trial, it would have no effect on disclosability under Act). Although you contend that the Texas Rules of Evidence constitute “other law” that makes the remaining submitted information confidential, we note that “[t]he Texas Rules of Civil Procedure and the Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *14 (Tex. Feb. 15, 2001). The submitted information does not fall into one of the categories of information made expressly public by section 552.022 of the Government Code. Therefore, the Texas Rules of Evidence are not applicable in this instance. Accordingly, we conclude that the department may not withhold from disclosure any portion of the remaining submitted information pursuant to section 552.101 of the Government Code in conjunction with the Texas Rules of Evidence.

In summary, the department may withhold from disclosure the information that we have marked pursuant to section 552.108(b)(1) of the Government Code. The department must release the remaining submitted information to the requestor in its entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one

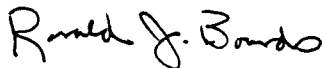
of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 168552

Enc. Marked documents

cc: Mr. Jim W. James
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(w/o enclosures)